

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

771363

To be argued by
WILLIAM J. STUTMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS GONZALEZ,

Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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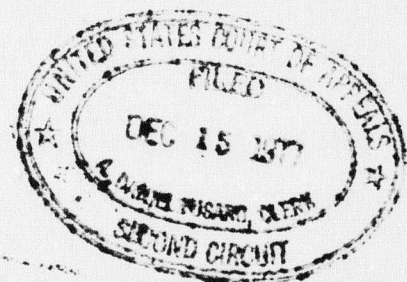


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FOR THE SECOND CIRCUIT

-----x
THE UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS GONZALEZ,

Defendant-

Appellant.
-----x

PRELIMINARY STATEMENT

Appellant, Luis Gonzalez, appeals to this Court from a judgment of the United States District Court for the Southern District of New York (Pollack J.), entered August 22, 1977 which sentenced him, after a jury trial, to a three year term of imprisonment, upon his conviction of violating 18 U.S.C. section 876. That statute makes it a crime to "knowingly" deposit "any communication...addressed to any other person and containing any threat...to injure the person of the addressee". Gonzalez was convicted for writing a letter to District Judge Edward Weinfeld in which he remonstrated with the Judge for having sentenced him to jail some fifteen years earlier, and in which he stated that he would see to it that the Judge was removed.

By order of this Court, dated October 28, 1977, William J. Stutman, Esq., was assigned to prosecute this appeal on Gonzalez' behalf under the Criminal Justice Act. It was further ordered that appellant be permitted to file eight xerox copies of the brief (and appendix).

ISSUES PRESENTED

1. Whether the evidence was sufficient to support a finding that appellant mailed "a threat" to injure the person of Judge Weinfeld ?
2. Whether appellant's conviction violates his constitutional right to freedom of speech ?
3. Whether the cumulative effect of the trial Judge's failure to give a full charge as to (a) a "true threat", (b) constitutionally protected freedom of speech and (c) all the prerequisites of an "Allen" charge was so prejudicial as to deny appellant a fair trial ?
4. Whether appellant was denied his constitutional rights to counsel of his choice and to effective representation of counsel when he was not allowed to have counsel who was apparently ready, willing and able to present a "political defense" on his behalf ?

STATEMENT OF THE CASE

Appellant was indicted for violating 18 U.S.C. Section 876 by mailing a letter allegedly containing a threat to kidnap* and injure the person of (Judge) Edward Weinfeld.

The trial testimony was brief: MARIE VOLL RATH (9ff**) is secretary to Judge Weinfeld. She receives his mail in the morning and brings it to him. In "early March" 1977 she received a letter written to the judge in Spanish and she arranged to have it translated. She then gave the translation to him. Although Judge Weinfeld then met

*Since no proof was proffered as to kidnapping this brief will limit itself to the threat to injure.

**Page references are to trial minutes.

with the United States Attorney, apparently concerning the letter, no additional security was requested by him afterwards (9-20).

JUANA GARCIA (31ff) translated the letter which was dated February 25, 1977, making a "literal" translation thereof as best she could because of its very poor spelling, composition, grammar and punctuation (34,61). In fact, she actually added punctuation "because I felt that it is the only way anyone could really understand the letter" (42). Her translation read by her and introduced into evidence despite objection, follows (37):

"Dear Judge Weinfeld; You have destroyed my life since you sent me to the federal jail but don't worry. I promise that you and I will meet soon to straighten this matter. You are an American dog with no compassion for his fellow man but I will fix you. I am going to remove you as judge when I leave this prison that I am in because I'm going to do to you what no one else has. You and your family will regret when I put my hands on you."

"Attentively yours, Luis Gonzalez, 349973, Block 3."

The Government then introduced a judgment of the Court which indicated that on January 26, 1962, Judge Weinfeld had sentenced appellant to a two year term of imprisonment (67-8).

JOHN COLEMAN, as assistant Deputy Warden with the New York City Department of Correction at the House of Detention for men on Rikers Island, testified that Gonzalez was admitted there on February 28, 1977 (69-74). He confirmed that appellant's prison number was 349-77-973; that he had been in cell block 3 (74-75); that an envelope in which Gonzalez had apparently sent the letter in question had a stamped return address of Rikers Island (76); and that inmates mail their

letters from their cell blocks (77).

KENNETH C. GRESSENS, a Government fingerprint expert, testified that appellant's fingerprints appeared on the envelope and letter in issue (84-89).

Appellant's only witness was DENA KOHN (91ff) who re-confirmed the impression of the Government's translator that the use of punctuation and spelling in the letter were poor and very often incorrect (98) and that there was not one but several thoughts expressed in the letter (102).

POINT 1

The Government's Evidence was
insufficient to establish appellant's
guilt.

In Point II, infra, it will be demonstrated that appellant's conviction violates his constitutional right to freedom of speech. Here it will be shown that the evidence failed to demonstrate beyond a reasonable doubt that appellant's letter contained "any threat to injure the person of the addressee," within the meaning of 18 U.S.C. section 876.

In United States v. Kelner, 534 F2d1020, cert. den. 429 U.S. 1022 (1976), this Court upheld the conviction of a member of the Jewish Defense League for causing to transmit in interstate commerce a threat to assassinate an Arab leader in violation of 18 U.S.C. section 875(c). That statute is virtually the same as the one at bar except that it outlaws "threats to injure the person of another" made via the means

of interstate commerce instead of mail. In Kelner the defendant explicitly stated, during a (television) news conference, that his organization intended to make sure that the Arab leader did "not leave this country alive" and that they were "planning to assassinate" him. In rejecting Kelner's claim that his statements were not "threats", this Court laid down the following guidelines for ascertaining whether language falls within the statutory prescription (534 F.2d at 1027):

"So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."

In other words, for appellant's conviction to stand, his words must have conveyed a "true 'threat'" to injure the person of Judge Weinfeld. Watts v. United States, 394 U.S. 705, 708 (1969); United States v. Compton, 428, F. 2d 18 (2d cir. 1970), cert. den. 401 U.S. 1014 (1971).^{*} In addition, in reviewing appellant's letter this Court should be mindful that where "There are, however, a number of innocuous interpretations which are equally plausible," as noted in United States v. Barclay, 452 F. 2d 930, 933 (8th Cir. 1971):

"In order to sustain its burden of proof under 876, the government must present evidence sufficiently strong to establish beyond a reasonable doubt that the communication in question conveys a threat of injury. Where a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. Absent such proof, the trial court must direct a verdict of acquittal." **

* Judge Pollack's failure to charge that there had to be a true threat will be dealt with in Point III, infra

** Again, Judge Pollack's failure to charge the language of Barclay will be dealt with in Point III, infra.

Examination of the specific language of appellant's letter in light of the foregoing criteria demonstrates that the words used by him did not unambiguously constitute an immediate threat upon the person of Judge Weinfeld. Cf. Kelner, supra, 534 F.2d at 1028. Appellant is a poor, illiterate, ignorant person who communicated with the Judge to remonstrate with him for having "destroyed" his life by sentencing him to jail. It is the grievance of a man, who writing out of despair and frustration at being in jail, seeks to inform the Judge, although in language that is admittedly far from artistic, that he will have him removed from the bench.

It is exactly the kind of letter a judge "might expect to receive" from a person he has sentenced who is writing from "within prison walls". See Barclay, supra, 452 F.2d at 933-34. Gonzalez' letter stating that Judge Weinfeld is "an American dog with no compassion for his fellow man", may well be said to be "worded in the rowdy dowdy argot of the streets, but it does not clearly convey a threat of injury." Barclay, id., at 934. Clearly, then, "his letter must be interpreted only as a crude, extravagant boast that he would have the Judge removed." Cf. United States v. Maisonet, 484 F.2d 1356, 1359 (4th cir.1973), cert. den. 415 U.S. 933 (1974). In Maisonet the appellant had written his sentencing judge from jail that if he ever got out the judge would never be able to "be prejudice (sic) and racist against another Puerto Rican like me". id. at 1357. Because conviction under 18 U.S.C. section 876 was upheld, Maisonet may well be cited in the government's brief at bar. However, the case is distinguishable on several grounds.

First of all, it is a Fourth Circuit case not binding on this Court. Secondly, no mention is made in Maisonet's letter that he hoped to remove the judge, a factor which the Fourth Circuit ruled made it impossible to find it as being "political hyperbole". Maisonet, *id.* at 1359. There was no language in Maisonet's letter to mitigate its otherwise ominous tenor which would have enabled the court to find an "equally plausible innocuous interpretation". Cf. Barclay, *supra*. Appellant's letter, on the other hand, does not contain a threat to "assassinate" (Kelner, *supra*) or "kill" (Compton, *supra*) Judge Weinfeld. See, also, United States v. Daulong, 60 F. Supp. 235 (W.D. La.1945) (indictment quashed which charged that the accused stated the he "had a notion" to kill the President and that if no one else did it, he "felt like" killing him; these words were found to be more expressions of hope or desire than "an expression of determination or intent to do the act itself").

A third distinguishing factor is that Maisonet "sent the letter to the Judge's home so that it would receive the Judge's personal attention" whereas at bar appellant apparently mailed the letter to the courthouse, certainly, the mere fact that Maisonet's letter was received at a judge's residence may well be more "threatening" than a letter delivered in the routine mail at the courthouse. Fourth, since Judge Weinfeld's secretary testified that the judge did not order any extra security precautions taken after appellant's letter was received and translated there was not any substantial evidence that tended "to show beyond a reasonable doubt that ordinary, reasonable recipient who is familiar

with the contents of the letter would interpret it as a threat of injury". Cf. Maisonet, supra, at 1358.*

Fourth, appellant wrote his letter in Spanish**which had to be translated before it could even be brought to the attention of Judge Weinfeld, whereas there is nothing to indicate that Maisonet wrote his letter in any language except English. Finally, and as quoted in Point III, the trial judge in Maisonet gave a full charge on the relevant law. 484 F.2d at 1359. As will be demonstrated in Point III, infra, Judge Pollacks charge at bar contained significant omissions. To summarize, Gonzalez' letter did not "necessarily constitute" a threat to injure the person of Judge Weinfeld. Cf. United States v. Prochaska, 222 F.2d. 1,2 (7th cir. 1955), cert. den. 350 U.S. 836 (1955). In short,

*The writer of this brief feels obliged to bring to the Court's attention the possible relevance of the following earlier case involving Judge Weinfeld: In Morgan v. Sylvester, 125 F.Supp. 380 (S.D.N.Y. 1954) aff'd 220 F.2d 758 (2d Cir. 1955) cert den. 350 U.S. 867 (1955), Judge Weinfeld had dismissed a prose civil rights action brought by one Judith Morgan against various state officials. Morgan, apparently had mental problems and was later committed to state mental facilities for apparently stabbing a person who she mistook for Judge Weinfeld, for whom she "had been lying in wait" because of his dismissal of the pro se action. See United States ex rel. Morgan v. Wolfe, 232 F. Supp. 85, 90 (S.D.N.Y. 1964). While Morgan may explain why Judge Weinfeld may be somewhat cautious in reviewing his mail, and in bringing letters to the attention of the United States Attorney, nevertheless, appellant should not be convicted because of such extraneous factors. Of course, the facts of Morgan are not part of the record or appeal. It is respectfully submitted, however, that if the jury had been aware of them they may well have returned a different verdict.

**Parenthetically, research has failed to disclose any other case involving a "threat" which was initially communicated in a foreign language.

Appellant's words, taken in their context, are most readily susceptible to the interpretation that they were a crude, even offensive, rhetorical device. They cannot be read unambiguously as a serious threat." Watts v. United States, 402 F. 2d 676, (D.C. Cir. 1968), 693 (dissenting opinion of Wright J.), revd. 394 U.S. 705, supra.

POINT II

Appellant's conviction violated his
constitutional right to Freedom of Speech

In Point I it was shown that appellant's letter was a mere expression of his grievances which fell far short of being a threat to injure the person of Judge Weinfeld within the meaning of 18 U.S.C. section 876. Such statements, rather, fall within the ambit of any citizen's constitutionally protected right to freedom of speech. As the Supreme Court has stated in Watts v. United States, 394, U.S. 705, 707, supra:

"a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech."

Merely because appellant told Judge Weinfeld that he was "an American dog with no compassion for this fellow man" and went on to notify him that he was going to be removed as a judge does not mean that Gonzalez was making impermissible threats. In fact, "such communication falls within the purview of the First Amendment whether phrased in the King's English or peddler's French." Barclay, supra, 452 F.2d at 933. Appellant may have used "political hyperbole" in

stating that he was going to "fix" Judge Weinfeld and "straighten" this matter", Cf. Maisonet, supra, 484 F.2d at 1359. Nevertheless, such language must be read in conjunction with the following mandate set down in Watts, supra, 394 U.S. at 708:

"For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254,270 (1964). The language of the political arena, like the language used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53,58 (1966), is often vituperative, abusive and inexact. We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." *

As noted in Point I, appellant did not tell Judge Weinfeld that he was going to assassinate, murder, or kill him, instead, he informed the jurist that he was going to have him removed, and this statement eliminated any possible ominous overtones from the letter. Cf. Maisonet supra. Appellant's words were not "so unequivocal, unconditional, immediate and specific...as to convey a gravity of purpose and imminent prospect of execution." Cf. Kelner, supra, 534 F.2d at 1027. Even if this Court were to find that appellant used a "very crude offensive method" to state his dissatisfaction with his imprisonment, such a means of speech is nevertheless constitutionally permissible, Watts, supra; Barclay, supra.

*Once again, Judge Pollcak refused to charge the language of Watts. See Point III, infra.

POINT III

The cumulative effect of (a) the trial Judge's failure to give a comprehensive charge and (b) his erroneous supplemental charge deprived appellant of a fair trial.

(a)

At several places in Points I and II, supra, it has been mentioned that Judge Pollack's charge to the jury contained significant omissions. At pages 143 through 144 of the charge, Judge Pollack instructed the jury as to what it had to find to conclude that appellant's letter contained a threat to injure Judge Weinfeld. His language appears to be taken from certain portions of this Court's opinion in Kelner, supra, 534 F.2d 1020, 1027. However, while Judge Pollack apparently limited himself to this brief statement of the Kelner principles he did not further instruct the jury, as Judge Owen did in Kelner: (a) to whether appellant intended his words as a threat or merely as a statement of opposition; (b) that "(M)ere political hyperbole or expression of opinion or discussion does not constitute a threat", or (c) that if the jury found that the statements were "no more than an indignant or extreme method of stating political opposition" it would be justified in finding that no threat was in fact made". Kelner at 1025. Trial counsel explicitly requested that Judge Pollack include these and other matters (discussed below) but the trial Judge refused to do so. (see pp 150-52 of trial minutes).

Thus, Judge Pollack would not charge that appellant's language had to convey a "true threat", Watts, supra; Compton, supra; that the

the government had to meet the burden of showing evidence removing any ambiguity where language could be interpreted in two ways, one of them innocuous; Barclay, supra; that any citizen had the right to seek the removal of a government official even if in language that is "vehement, caustic, vituperative, abusive and inexact," Watts, supra. In fact, should the government choose to place great reliance on the conviction in Maisonet supra, it must be pointed out that in that case the District Judge apparently gave a much more inclusive charge than Judge Pollack did here. As the Fourth Circuit summarized it (484 F.2d. 1356,1359):

"He (the trial judge) charged the jury that the government was required to prove beyond a reasonable doubt that the letter contained a threat to injure the judge and that Maisonet intended it to be such a threat. He instructed that every person has the right to communicate with any public official calling attention to improper or unlawful conduct on the officials part and that the language used may be "vehement, caustic, unpleasantly sharp, vituperative, abusive, or inexact" without violating the law. He cautioned that every person has the right to seek by proper means the removal of any public official, and finally, he told the jury that a threat to seek an official's removal, regardless of whether the person has reasonable grounds to believe that the official acted improperly, is not a violation of the law. We find no reversible error in Maisonet's complaints about the charge. Taken as a whole, it properly instructed the jury and adequately presented Maisonet's defense."

On the contrary, however, it cannot be said that "taken as a whole, Judge Pollack's charge properly instructed the jury and adequately presented Gonzalez' defense.

(b)

The record discloses that the jury retired at 3.10 p.m. (155)

Five minutes later it returned and asked(156): "Does 'threaten to injure' necessarily mean to do bodily injury? Could it include mental anguish?" At 4:15 p.m., Judge Pollack apparently charged in the affirmative (160). At 5 p.m., the jury returned to the Court with a note advising that "It does not appear that we can reach a unanimous verdict" (161). Judge Pollack then proceeded to give his version of the supplemental charge suggested by the Supreme Court in Allen v. United States, 164 U.S. 492 (1896). (See pp. 161-64 of trial record.)

However, and as noted by trial counsel (164-65), the supplemental charge contained several errors. First it initially failed to advise that the verdict should reflect the conscientious judgment of each juror, cf. United States v. Hynes, 424 F. 2d 754 (2d Cir. 1970), cert. den. 399 U.S. 933 (1970), an oversight which Judge Pollack later tried to rectify. In addition, the Court charged that the case is " a relatively simple one (162) involving everything "physical" (163) from the mailing of the letter, and that "the question put to you is were the mails mis-used" (163). Again, Judge Pollack tried to correct himself, explaining that he "was talking about the use of the mails to convey a threat of bodily injury" (166). Nevertheless, the coercive effect of Judge Pollack's charge is apparent because the jury returned its verdict twelve minutes after it had received the supplemental instructions.

While "This Court has consistently affirmed its approval of the supplemental charge to encourage a verdict in the face of an apparent deadlock, Hynes, id., at 757, when Judge Pollack's supplemental charge is read along with his charge in chief, the prejudice to appellant is

apparent.

POINT IV

Appellant was deprived of his
right to counsel of his choice

Prior to the trial there were preliminary conferences before Judge Brieant. Present were appellant, his trial counsel from the Legal Aid Society, and a member of the Criminal Justice Act panel. A review of the minutes of those hearings (items 9 and 10 of the record on appeal) shows that Legal Aid counsel informed the Court that his office had been assigned to try the case; that in a chance meeting with the panel attorney he had mentioned to the latter the nature of this case (in which appellant apparently wished to interpose a political defense involving alleged persecution of Puerto Ricans; that the panel attorney replied that he had a prior working familiarity with such cases, a knowledge apparently not possessed by Legal Aid counsel, and that he, the panel attorney, would therefore be willing to substitute; that counsel told the Court that the panel lawyer would have a better rapport with appellant (4)*; and that Legal Aid counsel differed with appellant about how to try the case (12), appellant insisting, among other things that contrary to counsel's advice, he wished to take the stand to make his political defense.

Nevertheless, in spite of Legal Aid counsel's express differences with appellant and the availability of substitute counsel, Judge Brieant

*References are to preliminary hearing minutes

refused to allow the substitution. This action was improper since choice of counsel should not be unnecessarily obstructed by the Court. Abraham v. United States, 549 F. 2d 336 (2d Cir. 1977). Cf. United States v. Sanchez, 483 F. 2d 1052, 1056 (2d Cir. 1973), cert. den. 415 U.S. 991 (1974) (where the trial court "'took more than adequate precaution to insure that appellant was represented by counsel, and that he was made completely aware during the pre-trial discussion of the situation regarding his true representation"). When Legal Aid counsel advised the Court that he was unable to effectively communicate with his client but that a ready, willing, and able panel member was present the trial court should have allowed the substitution. Cf. United States v. Calabro, 467 F. 2d 973, 987 (2d Cir. 1972), cert. den. 410 U.S. 976 (1973), reh. den. 411 U.S. 941 (1973).

Appellant may not have had the absolute right to have a specific attorney appointed for him. See United States v. Tortura, 464 F. 2d 1202, 1210 (2d Cir. 1972), cert. den. sub. nom. Santoro v. United States, 409 U.S. 1063 (1972). Nevertheless, Judge Briant's failure to allow the panel attorney to try the case denied appellant his right to conduct a(political) defense in which he very deeply believed. He was therefore denied the effective representation of counsel.

CONCLUSION

The judgment of conviction
should be reversed and the
indictment dismissed

December 15, 1977

Respectfully submitted,
WILLIAM J. STUTMAN
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

v.

AFFIDAVIT OF SERVICE

LUIS GONZALEZ,
Defendant-
Appellant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

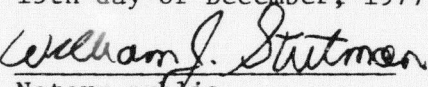
PATRICIA BARTLETT, being duly sworn, deposes and says:

she is not a party to this action, is over 18 years of age and resides in New York, NY; on December 15, 1977, she served the annexed brief and appendix upon Hon. Robert B. Fiske, Jr., United States Attorney, Southern District of New York, attorney for appellee, at one St. Andrews Plaza, NYC 10007, the address designated by said person for that purpose by depositing a true copy of same, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office with in the State of New York.



Patricia Bartlett

Sworn to before me this
15th day of December, 1977


Notary public

WILLIAM J. STUTMAN
NOTARY PUBLIC, State of New York
No. 31-9233920
Qualified in New York County
Commission Expires March 30, 1978